Choon & Ors. v. *Public Prosecutor*,[3] that a magistrate should not be denied the use and benefit of his own knowledge and experience. However, he did not say that he found the exhibits P1 — P4 identical to those used in his other cases. I think some help can be derived from *Dobree's* book. It would appear from page 15 of the book that in *chee fah* the agent's record would have the numbers 1 to 36 written horizontally across the top of the paper and the amount of each bet in column below each number. An agent's record of stakes would also contain the sum deducted by way of commission. If the agent has collected a small number of bets all the 36 numbers would not appear in the records but only those on which he has collected bets. Exhibits P1 — P4 appear to contain numbers written according to this pattern but without the sum allowed for the agent's commission. The exhibits also bear a strong resemblance to the specimens of betting slips shown at page 36 in the book. There are therefore ample grounds for holding that P1 — P4 are punters' slips.

The next point that calls for consideration is whether they are lottery tickets within the meaning of the Ordinance. In holding that they are such tickets the learned magistrate gave the following reasons:—

"Bearing in mind that Ex. P1 — P4 are stakes in *chee fah*, we have on page 16 of *Dobree's* book "Those punters who have staked on the announced name or number are subsequently paid by the agents their bets a gross amount of 30 times their original stakes."

It is true that those words appear in *Dobree's* book. No doubt punters will be paid if they have successfully staked. But there is nothing in *Dobree's* book to indicate that betting slips like P1 — P4 would entitle the holder thereof to money or money's worth in the *chee fah* lottery. They may well be records of bets the punter only intends to, but has not yet, placed with an agent. I am therefore not persuaded that P1 — P4 are lottery tickets and in the result the presumption under section 9(2) does not arise.

The appeal is allowed. The conviction is quashed and the sentence set aside. The fine if paid is to be refunded.

Appeal allowed.

Solicitors: *Joseph & Son.*

MOHAMED KUNJU v. PUBLIC PROSECUTOR

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Ong Hock Thye F.J.) February 8, 1966]

[K.L. — Federal Court Criminal Appeal No. X26 of 1965]

Penal Code s. 376 — Rape — Corroboration — Infection with venereal disease.

Criminal Law and Procedure — Preliminary inquiry — Committal on charge of attempted rape — Whether charge can be amended to one of rape at trial.

Evidence — Witness absent at trial — Deposition under s. 33 Evidence Ordinance, 1950.

In this case the appellant had been committed at the preliminary inquiry for attempted rape but at the trial he was found guilty of rape of a girl of about 11 years. The trial judge found that there was ample corroboration of the evidence of the girl that it was the appellant who had connection with her and had infected her with gonorrhoea. He was sentenced to ten years imprisonment.

Held: (1) there was corroboration of the evidence of the girl in this case both as regards the factum of connection with somebody and being infected by that person and as also as regards the identification of the appellant and therefore the appeal against conviction should be dismissed;

(2) in the circumstances as no violence was used and as the girl had not suffered physical damage that will impair her future chances of marriage, the sentence would be reduced to one of seven years's imprisonment.

Cases referred to:—

(1) *R.* v. *Rider* [1954] 1 All E.R. 5 at p. 6.

(2) *Kee Siak Kooi* v. *R.* [1955] M.L.J. 57, C.A.

FEDERAL COURT.

Dato' R. P. S. Rajasooria (*R. P. S. Rajasooria Jr.* with him) for the appellant.

Ajaib Singh (Deputy Public Prosecutor) for respondent.

The grounds of judgment of the court below were as follows:

Raja Azlan Shah J.: Before me the accused was charged with the offence of rape under section 376 of the Penal Code. It was submitted by defence counsel as a preliminary issue that the prosecution could not proceed in the way they did on the ground that at the end of the preliminary enquiry the committing magistrate had committed the accused on a charge of attempted rape under sections 511 and 376 of the Penal Code. There is nothing novel in that argument. In answer to counsel's argument I think it would be sufficient if I quote a passage from the judgment of Streatfeild J. in *R.* v. *Rider*: [1]

"I have come to the conclusion that the proper construction to put on the word 'charge' is that a man is charged before a court which has jurisdiction to determine the matter in question..... But if justices commit a man for trial, they are not adjudicating on the case. The only thing they determine is whether there is a *prima facie* case to answer, and, if they think there is, they commit the accused. He is then brought before the court at assizes or quarter sessions on indictment, and it seems to me that then, for the first time, he is before a court having jurisdiction to determine the matter".

The charge against the accused was as follows:

"That you, on or about the 13th March, 1965, at about 10.30 p.m. at P.W.D. Barrack No. 242B Jalan Nibong, Dungun, in the District of Dungun, in the State of Trengganu, committed rape on Azizah binti Abdullah and thereby committed an offence punishable under section 376 of the Penal Code".

The prosecution case was as follows. P.W.1, aged about 11 years at the time of the alleged incident, was a Standard Five student at Dungun English School, and lived with her mother (P.W.2) and P.W.3. P.W.2 and P.W.3 had been living as man and wife for the past two years, and the latter was a P.W.D. labourer. The accused was also a P.W.D. labourer and had been having meals at P.W.3's house in the absence of his wife who had left for Kuala Trengganu for confinement.

On 13th March, 1965, according to P.W.3, the accused ate at his house. After the meal, the accused asked P.W.3's permission to take P.W.1 to see the Malaysian Brothers' Show at Dungun. P.W.3 gave his permission.

What happened afterwards can only be gauged from the evidence of P.W.1 herself. She stated that after the show the accused took her to his house at the P.W.D. barracks where, according to her, he raped her. That night she was wearing a blue gown. After the alleged rape, the accused went to the front door and peeped out to see whether there was anybody about. He then asked P.W.1 to go out first and wait at the front gate of the P.W.D. compound. She did so. A little later the accused came along on his bicycle and took her back to her house. She woke up P.W.3 in order to enter the house. She did not say anything to P.W.3. This point was criticised by defence counsel because she did not complain about the incident to P.W.3.

The mother, P.W.2, who had been admitted to Kuala Trengganu hospital on 8th March, 1965, returned to the house on 22nd March, 1965. P.W.1 was then at school. She cleaned the house and in doing so she found P.W.1's underpants beneath a cupboard. She examined them and found them to be stained with pus. On P.W.1's return from school she asked her about the underpants. In reply, P.W.1 told her what had happened between the accused and her on the night of 13th March. Whatever was said to her mother in answer to the latter's questions nine days after the occurrence of the alleged incident is not admissible under section 8 of the Evidence Ordinance as showing consistency of her conduct with her statement in court. Neither can it be used as evidence or corroboration of the facts stated.

A report was lodged by the mother at the police station on the following day. That report was based on hearsay and therefore not admissible. P.W.1 was examined by Dr. Subodh Kumar, and so was the accused who had since been arrested. Dr. Subodh Kumar, who gave evidence at the preliminary enquiry, was cross-examined at great length by defence counsel. He was not available at the present trial and the prosecution applied to tender his deposition under the provisions of section 33 of the Evidence Ordinance. The principle under which those provisions can be applied has been stated by various authorities. Suffice it if I reproduce a passage in the judgment of the Court of Appeal in *Kee Siak Kooi* v. *Regina*: [2]

> "It is established law that before any evidence can be admitted under section 33 of the Evidence Ordinance, 1950, proof of the circumstance contemplated in that section must be strictly given".

In the present case, P.W.7, the O.C.P.D. Dungun, testified that he first came to know about the date of hearing in respect of this case on 26th October, 1965, on which date he received the subpoena. He rushed to the hospital and was told that the doctor had left for India that very morning and that he would not be returning to this country. P.W.9, Dr. Leong Chee Fui, who was in charge in the absence of the Chief Medical Officer, stated that Dr. Kumar who was a contract officer had completed his contract and had left the country and his whereabouts were unknown. In the light of this evidence I was satisfied that the presence of Dr. Kumar could not be obtained without an amount of delay and expense which I considered unreasonable. In the circumstances I admitted Dr. Kumar's evidence under the provisions of section 33.

The doctor examined P.W.1 on 23rd March, 1965, and found her to be suffering from sub-acute gonorrhoea. He also examined the accused and found him to be suffering from sub-acute stage of gonorrhoea. The doctor was vigorously cross-examined as to the presence of gonorrhoea in the vagina of P.W.1. He gave three possibilities as to how the disease could be contracted and he said in evidence that the common cause was through sexual intercourse. He further stated that the presence of gonorrhoea in the vagina may be due to partial penetration between the vulva. He did say that the infection could be caused from a towel or finger but that was a remote possibility. We are concerned with probabilities and not possibilities, and I was satisfied that in all probabilities, in the light of the doctor's evidence, P.W.1 was infected with gonorrhoea through sexual intercourse.

In a sexual case where the victim is a girl of tender years, it is well-established that it is a rule of prudence that it would be dangerous to act on the evidence of a child, whether sworn or unsworn, unless corroborated.

P.W.1 stated that the accused took her out to see the show with the permission of P.W.3. This was borne out by the evidence of P.W.3 himself. This aspect of P.W.3's evidence was not seriously challenged by the defence. I accepted P.W.3's evidence as supporting P.W.1's evidence in this direction.

After the show P.W.1 stated that the accused

took her to his house. P.W.4 corroborated P.W.1's evidence. He testified as follows. He said that he lived within the same P.W.D. compound as the accused. At about 10 p.m. on 13th March, 1965, he was at the main gate of the P.W.D. compound. He saw the accused carrying a small girl on the bar of his bicycle and proceeding towards his barrack. The girl was wearing a white gown. He could not recognise the girl then. About twenty minutes later he saw a child coming out of the barrack and heading towards the main gate where she stopped. He had then followed her to the gate and had recognised her as P.W.1. He started walking back towards his barrack. He then saw the accused coming on a bicycle. He stopped near P.W.1, lifted her on to his bicycle, and rode away. His evidence was criticised by the defence. It was said that his evidence was procured. It was also said that he had just returned from gaol. I have seen him in the witness box and I was satisfied that he was speaking the truth. Had he wanted to tell the untruth he would have found no difficulty in saying that the girl was wearing a blue gown. That was what the girl had said in court.

In the house, P.W.1 said that the accused raped her. To my mind there was overwhelming evidence of corroboration of rape. Dr. Subodh Kumar who examined P.W.1 stated without qualification that she was suffering from sub-acute gonorrhoea. In cross-examination at the preliminary enquiry he stated that the most common cause is through sexual intercourse and that the presence of gonorrhoea in the vagina of the girl may be due to partial penetration between the vulva. I accepted his evidence on this point. The doctor also deposed that the accused was suffering from sub-acute stage of gonorrhoea. I also accepted his evidence on this point. The logical inference to be drawn from the given facts was that the accused who was suffering from gonorrhoea had raped P.W.1, thus passing the disease on to her. In this connection I would like to quote a passage from the Penal Law of India by *Gour* 7th Edition, Volume III, at page 1854:

> "According to books on medical jurisprudence there there are four tests to be applied to corroborate or contradict evidence with regard to rape. They are the presence or absence of....(4) gonorrhoea or syphilis in one or both".

It was then contended by the defence that P.W.1 had contracted the disease through her mother who they said was suffering from venereal disease. P.W.2 testified that she never had venereal disease at any time and that before she was admitted to hospital on 8th March, 1965, she had no venereal discharge. Dr. Sunil Kumar (P.W.8) who treated her stated that on admission he found that she was suffering from a chronic infection of the uterus. She had a mucoid discharge before the operation but it was not a gonorrhoeal discharge. The doctor stated in no uncertain terms that no gonococci was present in the discharge. When he was recalled by the defence the doctor stated that he operated on her not because she had chronic gonococci infection. Gonorrhoea was not specifically found on her. I accepted his evidence that P.W.2 had no venereal discharge. My assessment of P.W.2 in the witness box left me with the impression that she was a "woman of the world". She appeared to have clean habits; her appearance was neat and tidy. To my mind she would be the last person on earth (assuming she had venereal disease, which I did not accept) to pass the disease on to other members of her family. Further, assuming (which I did not accept) that she had contracted venereal disease, she would undoubtedly have found P.W.1's stained underpants before she left for the hospital. Her evidence was criticised by the defence on details as to her past and present marital relations which I considered were not quite relevant for present purposes. It therefore follows that P.W.1 contracted the disease after P.W.2 was admitted into hospital. It was then argued that P.W.3 who was suffering from venereal disease had infected P.W.1. P.W.3 testified that he had never suffered from venereal disease although he had received injections on several occasions whenever he was sick. After seeing him in the witness box I accepted his evidence as the truth.

Much was said by the defence on the aspect of the taking of P.W.3's smear. It was said that two smears were taken from him because the hospital authorities found them to be suspicious. It was again said that the hospital assistant who had examined P.W.3's smear had switched the smear with that belonging to the accused. I found great difficulty in accepting that proposition. It must be remembered that P.W.1 and the accused were examined on 23rd March, 1965, and P.W.3 was examined four days later.

It was argued that the doctor was not able to say that the accused was suffering from venereal disease as the hospital assistant, Gangadharan, who took the smear was not called as a prosecution witness. The doctor testified that Gangadharan examined the accused's smear and produced the result to him. The doctor had also checked the slide. I found and was satisfied that the accused's smear was properly taken and examined.

It was then said that P.W.1 who returned to the house on the night of the incident had not complained to P.W.3. It was also suggested that failure of P.W.1 to complain to her mother when she visited her at the hospital was a point unfavourable to the prosecution. To my mind it is not unusual for a girl of tender years to refrain from complaining of the shameful

behaviour which was inflicted on her. The fact that she hid the stained underpants under the cupboard irresistibly showed that she feared somebody would come to know of the incident. It was further said that P.W.2 never confronted the accused when the latter came to the house at about 7 p.m. on 22nd March, 1965. After examining the evidence I was satisfied that in all probability P.W.1 had not returned from school then and therefore P.W.2 would not have then known the true facts. Other criticisms were levelled at the prosecution case, but after considering them I have found them to be without sufficient substance to merit mention.

Reviewing the prosecution case, I was satisfied that they had proved their case which, if unrebutted, would warrant the accused's conviction.

The defence was an *alibi*. The accused testified that his wife left for Kuala Trengganu for confinement in January 1965 and did not return until April 1965. During her absence he had his food at P.W.3's house. He said that he stopped doing so on 6th March, 1965, after which he had his food in Samsuddin's house. Samsuddin (D.W.2) stated that the accused started having his food at his house from 6th March, 1965. To my mind the date seemed to be too exact to be true. On 13th March, 1965, the accused said that he did not go to P.W.3's house. He denied having meals at P.W.3's house. On that crucial date he said he returned from work together with Samsuddin and Abdul Kadir in the same lorry at 6 p.m. and went straight to Samsuddin's house. Samsuddin, on the other hand, stated that Abdul Kadir and he returned from work at 3 p.m. while the accused returned at 6 p.m. At 8 p.m. the accused had his meal together with the two persons. Afterwards they played cards. I found it difficult to accept the accused's story that he had completely stopped having food at P.W.3's house from 6th March, 1965. He did not give any explanation to that effect. The only explanation came from Samsuddin who said that the accused took his food at his (Samsuddin's) house because the accused had an inconvenience. What that inconvenience was was only known to both the accused and him.

Accused further said that on 22nd March, 1965, at about 8 p.m. he went to P.W.3's house. P.W.3 was not at home and the accused said that P.W.2 had told him that P.W.3 had gone to the pictures with P.W.1. Accused said that he then demanded the return of $300 which he had earlier loaned to P.W.3. P.W.2 told the accused that she had no money. The accused told her that if she did not return the money on the following day he would report the matter to the police. The accused's story that P.W.2 had told him that P.W.3 had gone to the pictures with P.W.1 was a bit far-fetched. To my mind it had no ring of probability. In the first place, P.W.2 had just returned from hospital on 22nd March, 1965, and it was highly unlikely that P.W.3 did go to the pictures with P.W.1 in the circumstances. Secondly, a telling point against the story put up by the accused was that his counsel had conceded that what was stated in the deposition of P.W.3 to the effect that "on the 22nd I went to pictures with P.W.1 and P.W.2" (see page 16 of the deposition) was a typewritten error and that the deposition ought to read: "I did not go to see any pictures with P.W.1 on 22nd". I then checked the original deposition of P.W.3 and I was satisfied that the latter version was the correct one. That being so, the accused's story was not worth a second glance. It would therefore follow that the accused's story which was alleged to be supported by the evidence of Abdul Salam (D.W.4) was a complete fabrication.

In trying to raise a reasonable doubt as to the truth of the prosecution evidence, to wit, that P.W.3 was not sufferring from venereal disease, the defence brought in Abdul Karim (D.W.3) to say that P.W.3 had told him about a week before the accused was arrested that he was suffering from gonorrhoea and had received two injections from Gangadharan (D.W.6) and had paid him $45. P.W.3 was never challenged on this point. Gangadharan testified that he had never attended on P.W.3 and had never given him any injections. An attempt to attack the evidence of D.W.6 by the defence was to the effect that D.W.6 had treated patients at their own houses, thus suggesting that he was a witness not to be believed. Unfortunately the evidence of D.W.3 to that effect was based on hearsay and was therefore of no value. Gangadharan appeared to me to be a respectable gentleman of integrity. I accepted his evidence as stated in court. There was an allegation of a meagre character by the defence that Gangadharan had told Sathanathan (D.W.5) at the police station where the accused was detained that the former would "see that the accused would go to gaol". To that, both D.W.5 and D.W.6 denied ever having gone to the police station.

Having regard to the case as a whole, I was satisfied that the defence had not raised a reasonable doubt as to the truth of the prosecution case or as to the accused's own guilt. I therefore found him guilty and convicted him.

The offence of rape is a serious one and the degree of seriousness of the offence must be reflected in the sentence. The present case is singularly peculiar in that the accused, knowing that he was infected with a notorious disease, passed it on to a girl of tender years thus ruining her name and health at an early age. Further, the accused had the audacity to suggest that P.W.3 had that dreadful disease. No leniency could

be shown to the accused in the circumstances. I therefore sentenced him to ten years' imprisonment.

The accused appealed to the Federal Court. His appeal was dismissed. The judgment of the Federal Court was delivered by:

Thomson L.P. (delivering oral judgment): This is a most unpleasant and unfortunate case and I do not think it calls for discussion of any great length.

The complainant, the prosecutrix, was a little girl of ten and the case is that the present appellant had connection with her in Dungun on 13th March, 1965. By reason of her age the question of consent was immaterial and if there was connection then it was rape.

There is no room for doubt that at about the material date the little girl became infected with gonorrhoea. There is no doubt from the medical evidence that she could have had sexual relations with a man involving partial penetration and there is no doubt that at the material date the appellant was suffering from gonorrhoea.

The girl's story is that it was the appellant who had connection with her and had infected her.

As regards the *factum* of connection with somebody and infection by somebody, her story is corroborated by the medical evidence. As regards identification of the appellant, it is corroborated by the evidence of her foster father, Ravindran, who says that on the night in question the appellant took her to the pictures on his bicycle and the evidence of a man, Tengku Ibrahim, who says that later that evening he saw the girl leaving the neighbourhood of the appellant's room and then being picked up by the appellant and taken on his bicycle in the direction of her own home. If these witnesses were telling the truth, and it was for the trial judge whether to believe them or not, there was thus ample corroboration implicating the appellant.

In all the circumstances of the case we do not think it is a case where we can or should intervene.

As regards the sentence of 10 years' imprisonment, we do not wish to suggest that in our view there was any reason for leniency whatsoever. It was a very serious case and it had to be treated seriously. Nevertheless, we cannot overlook the fact that there was no violence used and the girl has not suffered physical damage that will impair her future chances of marriage.

In the circumstances we feel justified in reducing the sentence to one of 7 years' imprisonment.

Appeal dismissed. Sentence reduced.

SIM POH HO & ORS. v. PUBLIC PROSECUTOR

[A.Cr.J. (Harley J.) February 9, 1966]

[Miri — Criminal Appeal No. K.16 of 1965]

Penal Code, s. 292 — Advertising that an obscene object can be procured from certain persons — Test to be applied — Mens rea — Liability of publishers.

The appellants who were the publishers of a newspaper had been convicted of publishing an advertisement in their newspaper that obscene photographs could be procured from or through certain persons. The magistrate held that section 292 of the Penal Code had been contravened as a person who answered the advertisement in fact received obscene photographs and as the appellants had been negligent because they did not know of the state of facts until after the prosecution.

Held: the proper test to be applied in such cases is "Do the advertisements by their wording proclaim that obscene objects can be procured?" and as in this case the learned magistrate had applied the wrong test the appeal must be allowed and the conviction set aside.

Cases referred to:—

(1) *Thomson* v. *Chain Libraries Ltd.* [1954] 2 All E.R. 616.

(2) *R.* v. *Hicklin* L.R 3; Q.B. 360.

(3) *Lim Chin Aik* v. *R.* [1963] M.L.J. 50, P.C.

(4) *Patel* v. *Comptroller of Customs* [1965] 3 W.L.R. 1229.

(5) *Comptroller of Customs* v. *Western Electric Co. Ltd.* [1965] 3 W.L.R. 1229.

(6) *Mohamed Ibrahim* v. *Public Prosecutor* [1963] M.L.J. 289.

(7) *R.* v. *Love* [1955] Cr.L.R. 250; 39 Cr.App.R. 30.

(8) *R.* v. *De Marny* [1907] 1 K.B. 388.

CRIMINAL APPEAL.

Y. Y. Chin for the appellants.

D. M. Goodbody for the respondent.

Cur. Adv. Vult.

Harley J. (read by Lee Hun Hoe J.): By section 292(d) Penal Code it is an offence to advertise that an obscene object can be procured from or through any person. The two appellants in the magistrate's court faced two counts of advertising "to the effect that" obscene photographs could be procured from (1) Miss Kam Lin and from (2) Mr. Yee Sim. I am not sure that the words "to the effect that" should be disregarded as mere surplusage or verbiage. The inserted words might imply and be intended to imply that although the advertisements did not directly indicate procurement of obscene photographs, yet that was the effect or result of the advertisements. If a secondary meaning only is relied upon, *prima facie* an advertisement would not be of an obscene object. An innuendo